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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF BENEFICIAL WATER)
USE PERMIT NO. 34125-s43B ISSUED TO) ORDER
DON A. BICKFORD)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a show cause hearing was held in the above-entitled matter on November 30, 1987 in Billings, Montana.

Permittee Don A. Bickford appeared at the hearing in person.

The Department of Natural Resources and Conservation (hereafter, the "Department") was represented at the hearing by Department legal counsel Faye McKnight.

Scott Compton, Field Manager of the Bozeman Water Rights Bureau Field Office, appeared as the Department staff witness.

EXHIBITS

Counsel for the Department moved that the Hearing Examiner's file in this matter, which had been reviewed by the Permittee, be accepted into the record in its entirety. The Permittee did not object to the inclusion of any part of the file. Therefore, the motion was granted, and the file in this matter is included in the record in its entirety.

The Department offered one exhibit for inclusion in the record in this matter:

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Department Exhibit 1 is a photocopy of a USDA aerial photograph of the area where Permittee's point of diversion and place of use are located (Photo No. 179-265). The Permittee outlined his place of use on the map in red ink at the hearing.

Department Exhibit 1 was accepted for the record without objection.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. MCA §85-2-314 states:

If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit or if the permit is otherwise not being followed, the department may, after notice, require the permittee to show cause why the permit should not be modified or revoked. If the permittee fails to show sufficient cause, the department may modify or revoke the permit.

2. On June 22, 1982, Provisional Permit to Appropriate Water Use Permit No. 34125-s43B was granted to Don A. Bickford, with a priority date of July 1, 1981. The Permit granted the Permittee the right to appropriate 300 gallons per minute ("gpm") up to 41.65 acre-feet of water per year for irrigation of 17.5 acres of land: 2.5 acres in the NE¼SE¼ of Section 30 and 15 acres in the SE¼NE¼ of Section 30, Township 7 South, Range 7 East, Park County, Montana. The water to be appropriated is specified as

surface water from the Yellowstone River, to be diverted by means of a pump. The specified period of use is April 1 through October 15, inclusive, of each year.

Under the terms of Water Use Permit No. 34125-s43B, the Permittee was required to have completed the permitted diversion and distribution works, and applied water to beneficial use as specified in the Permit, on or before May 1, 1983 or within any authorized extension of time. The Permittee further was required to file the Notice of Completion of Water Development for his project on or before July 1, 1983.

3. The Department received a Notice of Completion of Water Development on July 20, 1983. The Permittee had filed this form requesting an extension of time, rather than the proper form for such a request: the Notice of Completion states that the Permittee did not have sufficient funds to complete work on the irrigation system, and requests an "extension of the Provisional Permit." The Department, treating the filing as an application for extension of time, granted the Permittee until May 1, 1984 to perfect the appropriation, and until July 1, 1984 to file the Notice of Completion of Water Development. (See July 26, 1983 Notice of Action on Application for Extension of Time.)

On May 22, 1984, the Bozeman Water Rights Bureau Field Office sent the Permittee a reminder that his Notice of Completion was due on or before July 1, 1984. The letter further stated that if the Permittee needed additional time to complete his project, he could request an extension of time. On June 21, 1984, the Department received a letter from the Permittee, requesting an

extension of time because he had not been able to get his "irrigation system gathered together as yet to get our project completed. . . ." The Department granted the Permittee an extension, requiring that a Notice of Completion be filed on or before December 1, 1985. (See June 22, 1984 Notice of Action on Application for Extension of Time.) The letter which accompanied the Notice of Action informed the Permittee that an investigation would precede any additional extensions.

On October 21, 1985, the Bozeman Water Rights Bureau Field Office sent the Permittee a reminder that his Notice of Completion was due December 1, 1985. The letter stated that the Permittee could file an Application for Extension of Time, but that it would not automatically be granted. In part, the reminder stated that "reasons for the delay will be evaluated as well as the amount of work already completed on the project." On October 31, 1985, the Department received an Application for Extension of Time from the Permittee, requesting that the deadline be extended to July 31, 1987. The reason for requesting the extension was listed as "insufficient funds."

The Bozeman Field Office sent the Permittee a letter on November 5, 1985, stating that the request for a third extension would be denied unless the Permittee provided substantial evidence ("in the form of engineering plans/designs, equipment acquisition receipts, etc.") that he was diligently pursuing the project. The letter informed the Permittee that if the extension was denied, the permit would be revoked and any future appropriation of water would need a new permit application. The

Permittee did not submit any information in response to the letter. (Testimony of Scott Compton.) On December 2, 1985, the request for additional time was denied (see December 2, 1985 Notice of Action on Application for Extension of Time), and the Permittee was notified that he had thirty days in which to request a hearing on the revocation. (See certified letter No. P424 742 899.)

On January 2, 1986, the Department received a verbal request for hearing from the Permittee, which the Permittee subsequently submitted in writing. (January 16, 1986 letter from Don A. Bickford, received by the Department on January 20, 1986.) Therefore, this matter proceeded to a show cause hearing.

4. The Permittee purchased a gasoline-operated pump for his proposed project, but did not install it, nor did he purchase or install any other pipe or equipment for his proposed sprinkler system. (Testimony of Don Bickford, Scott Compton.)

5. The Permittee did not divert water or apply it to the beneficial use stated in Water Use Permit No. 34125-s43B on or before the Permit deadline of May 1, 1983, nor within the two extensions granted to him. (Testimony of Scott Compton, Don Bickford.)

6. The Permittee testified at the hearing that he had not completed the permitted diversion and distribution works or applied water to beneficial use, due to lack of sufficient funds since the Permit was granted. In response to questioning, the Permittee stated that he had no idea when he would be able to complete the project and perfect his water right, if the Permit in this matter was not revoked.

7. Scott Compton testified that the Permittee had been granted a sufficient period of time for development of a project of the size involved in this matter (irrigation of 17.5 acres of land). He further testified that the Permittee had not responded to requests for evidence that he was diligently pursuing the project.

Mr. Compton stated that the Permittee should be able to obtain water for his irrigation needs from the Park Conservation District, which has reserved water, at such time as the Permittee may be ready to pursue his project.


Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW


1. The Department has continuing jurisdiction over the subject matter herein, and over the Permittee. See MCA §85-2-312 et seq.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter is properly before the Hearing Examiner.


3. Because the Permittee did not complete work on the appropriation works or apply water to the beneficial use contemplated in the Permit within the time allotted under the terms of the Permit and the authorized extensions thereof, the Department is authorized to revoke the Permit. MCA §85-2-314.



4. The Permittee's failure to obtain the diversion and distribution equipment necessary to perfect the Permit due to continuing economic difficulties does not constitute sufficient cause not to revoke the Permit.



In order to be entitled to take a place in the priority system, a Permittee must proceed to develop the proposed appropriation works with due diligence. If a Permittee does not proceed to perfect his appropriation within a reasonable period of time after he is granted a Permit, but attempts to retain the Permit with its priority date, he is in essence attempting to reserve water for future use, an act which is limited to the federal and state governments and their political subdivisions and agencies. See MCA §85-2-316. If private individuals were allowed to retain water rights indefinitely without ever exercising (and thereby perfecting) them, potential appropriators with immediate need for water and bona fide intent to beneficially use it could be prevented from obtaining water because of "paper rights".



In the present matter, the Permittee has not begun to construct the project despite its small size (17.5 acres of land), did not provide any plans or information which suggests that he has planned what equipment to use and knows how much it would cost (see Finding of Fact 3), and does not know when, if ever, he could complete the project and perfect the water right. (See Finding of Fact 6.) Therefore, it is not possible to find that the Permittee has proceeded with due diligence, or that he has present bona fide intent to appropriate water for a beneficial use.

Wherefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

ORDER

Beneficial Water Use Permit No. 34125-s43B, issued to Don A. Bickford, is hereby revoked.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 11th day of December, 1987.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
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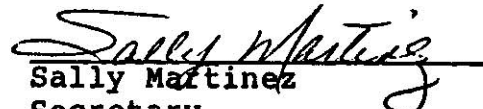
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by mail upon all parties of record at their address or addresses on this 11th of December, 1987 as follows:

Don Bickford
675 Main Street
Billings, MT

Scott Compton
Field Manager
Bozeman, MT 59715
(inter-departmental mail)

Faye McKnight
Legal Counsel
1520 East Sixth Ave.
Helena, MT 59620-2301
(hand-issued)


Sally Martinez
Secretary

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